Sri Devi a/p Kanan & Ors v Malaysian Airline System Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-15–02 OF 2016
AZIZUL AZMI ADNAN JC
26 SEPTEMBER 2016

Civil Procedure — Discovery — Application for — Plaintiffs applied for specific and general discovery against defendants — Whether requirements of applicable test for discovery fulfilled — Whether application allowed plaintiffs to fulfilled requirements of ss 5 and 6 of the Government Proceedings Act 1956

Civil Procedure — Striking out — Application to strike out action — Defendants applied to strike out plaintiffs' action — Whether doctrine of res ipsa loquitur applicable against third to eight defendants — Whether court should strike out action on ground that plaintiffs' claim exaggerated — Whether suit lacked bona fide and frivolous, vexatious and abuse of process of court — Rules of Court 2012 O 18 r 19 — Government Proceedings Act 1956 ss 5 & 6

The present action was emanated from the disappearance of a Boeing 777 with a flight code of MH370 ('MH370') on 8 March 2014. The third to ninth defendants ('the defendants') had applied vide encl 14 to strike out the present action whereas the plaintiffs ie the dependents of a passenger of MH370 vide encl 16 had applied for specific and general discovery against the defendants. The plaintiffs had also made preliminary objections against encl 14 that: (a) the application ought to be dismissed as it was made after pleadings had closed and after the suit had been set down for trial; (b) the ground for striking out under O 18 r 19(1)(a) of the Rules of Court 2012 ('the ROC') had been abandoned by the defendants; and (c) federal counsel acting for the defendants should not affirmed the affidavit in support of encl 14, as it is trite law that a solicitor should not depose affidavit on behalf of a litigant if the facts to be deposed are contentious or disputed questions of fact. With regards to encl 14, the defendants submitted that the doctrine of *res ipsa loquitur* was not applicable against the third to eight defendants as the flight was not under the sole management and control of the third to eighth defendants. It was further submitted that the amount of the plaintiffs' claim was exaggerated and inflated in order to sensationalise the suit against the defendants. The defendants also submitted that the suit lacked bona fide and was frivolous, vexatious and an abuse of process of court. As for encl 16, it was submitted that it was necessary in the interest of justice for the documents to be disclosed as it would allow compliance by the plaintiffs with the requirements of ss 5 and 6 of the

Government Proceedings Act 1956 ('the Act'). Further, it was submitted that the documents were relevant to the issue raised in the pleadings. The plaintiff had also precisely and specifically requested for documents that were in possession, custody and power of the defendants, to which the plaintiffs did not have access.

Held, allowing encl 14 in part with no order as to costs; and allowing encl 16 with costs:

(1) In respect of the preliminary objections, the defendants had filed the striking out application before the case was set down for trial and this ought not to be refused purely on this ground. It was sufficient for the grounds of application under O 18 r 19(1)(a) of the ROC to be explained at a paras (a), (b) and (d) at p 3 of the notice of application even though no reference was made to relevant sub-rule. Further, the affidavit in support of the striking out application also did not contain any disputed or contentious facts. In fact, the affidavit did not contain any facts at all, but raised points of law, which ought to have been better addressed by way of submissions. Based on the reasons, the court proceeded to hear the application on its merits (see paras 14, 17 & 19).

(2) The court allowed the striking out application against the fourth and sixth defendants on the basis that they were government departments and did not have any separate legal personality. The court also allowed the striking out application against the seventh and eight defendants on the ground that the statement of claim did not disclose a reasonable cause of action against them (see para 49).

(3) The court dismissed the application to strike out the action against the third, fifth and ninth defendants. The mere fact that the plaintiff's case may appear weak should not form the basis for striking out action. In the present case, there were sufficient pleaded facts to establish that the plaintiffs' case against the third, fifth and ninth defendants were not groundless or bereft of any prospect of success. Further, there was no evidence to support the contention that the plaintiffs' action was not bona fide, hence the defendants' application to strike out the action under O 18 r 19(1)(d) was also refused (see paras 47–49).

(4) The doctrine of *res ipsa loquitur* was pleaded at para 42 of the statement of claim against the first defendant as well as the third to eight defendants. Based on the facts, the defendants that had been named in the plaint were all possible defendants. The first, third and fifth defendants collectively would have had sole and exclusive control over MH370, hence the application for striking out on the ground that the doctrine of *res ipsa loquitur* was not applicable to the present instance could not be sustained. In addition, whether or not the doctrine of *res ipsa loquitur* would apply to impute liability upon defendants would be a matter for determination

after the evidence has been evaluated after trial (see paras 39–40).

(5) The quantum of damages would be subject to proof at trial. Even if the plaintiffs' claim was overly optimistic, it did not justify the striking out of the whole action (see para 42).

(6) The court allowed encl 16 on the ground that the requirements of the applicable test in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96 had been fulfilled. The court was satisfied that: (a) there were documents that were in the possession of the defendants that relate the incident in question; (b) the documents were or may be relevant to the facts that had been pleaded in the statement of claim; and (c) it was not seriously in dispute that the documents remain in the possession, custody or power of the defendants. Further, the documents that had been specifically requested were required in order for the plaintiff to fulfilled the requirements of ss 5 and 6 of the Act (see para 56).

[Bahasa Malaysia summary

Tindakan ini berbangkit daripada kehilangan sebuah Boeing 777 yang mempunyai kod penerbangan MH370 ('MH370') pada 8 Mac 2014. Defendan ketiga hingga kesembilan (defendan-defendan) telah memohon melalui lampiran 14 untuk membatalkan tindakan ini manakala pihak plaintif iaitu keluarga salah seorang penumpang MH370 melalui lampiran 16 telah membuat permohonan untuk penzahiran khusus dan umum terhadap defendan-defendan. Pihak plaintif juga telah membuat bantahan awal terhadap lampiran 14 bahawa: (a) permohonan itu sepatutnya diketepikan kerana ia dibuat selepas pliding telah tamat dan setelah saman itu ditetapkan untuk bicara; (b) asas untuk membatalkan di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012 ('KKM') telah diabaikan oleh defendan-defendan; dan (c) peguam persekutuan yang mewakili defendan-defendan tidak sepatutnya mengikrarkan afidavit bagi menyokong lampiran 14, memandangkan ia merupakan suatu undang-undang yang mantap bahawa seorang peguamcara tidak sepatutnya mendepos afidavit bagi pihak seseorang litigan sekiranya fakta yang hendak dideposkan merupakan fakta yang dipertikaikan atau dibantahkan. Berkenaan dengan lampiran 14, defendan-defendan telah menghujahkan bahawa doktrin *res ipsa loquitur* tidak terpakai terhadap defendan ketiga hingga defendan kelapan kerana penerbangan itu bukanlah di bawah pentadbiran dan kawalan defendan ketiga hingga kelapan. Selanjutnya turut dihujahkan bahawa jumlah tuntutan plaintif telah dibesar-besarkan dan ditambah-tambah dengan niat untuk mensensasikan saman terhadap defendan-defendan. Defendan-defendan turut menghujahkan bahawa saman itu tidak bona fide dan remeh, menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah. Bagi lampiran 16 pula, dihujahkan bahawa adalah perlu demi kepentingan keadilan untuk dokumen-dokumen itu dizahirkan kerana ia akan membolehkan pematuhan

oleh pihak plaintif terhadap kehendak ss 5 dan 6 Akta Prosiding Kerajaan 1956 ('Akta itu'). Selanjutnya, dihujahkan bahawa dokumen-dokumen itu adalah relevan kepada isu yang dibangkitkan dalam pliding. Pihak plaintif juga telah dengan tepat dan spesifik memohon kepada dokumen-dokumen yang berada dalam milikan, simpanan dan kuasa defendan-defendan, yang mana pihak plaintif tidak mempunyai akses.

Diputuskan, membenarkan sebahagian lampiran 14 dengan tiada perintah berhubung dengan kos; dan membenarkan lampiran 16 dengan kos:

(1) Berkenaan dengan bantahan awal, defendan-defenadan telah memfailkan permohonan pembatalan sebelum kes ditetapkan untuk bicara dan permohonan ini tidak sewajarnya ditolak semata-mata atas asas ini. Adalah memadai untuk asas permohonan di bawah A 18 k 19(1)(a) KKM dijelaskan di perenggan (a), (b) dan (d) di ms 3 notis permohonan walaupun tiada rujukan kepada sub-kaedah yang relevan dibuat. Selanjutnya, afidavit sokongan permohonan pembatalan itu juga tidak mengandungi apa-apa bantahan atau fakta yang dipertikaikan. Malah, afidavit itu tidak mengandungi apa-apa fakta pun, tetapi membangkitkan isu perundangan, yang sewajarnya adalah lebih baik diselesaikan melalui hujahan. Berdasarkan sebab-sebab ini, mahkamah ini meneruskan untuk mendengar permohonan itu berdasarkan merit (lihat perenggan 14, 17 & 19).

(2) Mahkamah membenarkan permohonan pembatalan terhadap defendan keempat dan keenam atas dasar bahawa kedua-duanya merupakan jabatan kerajaan dan tidak mempunyai personaliti yang berasingan di sisi undang-undang. Mahkamah juga membenarkan permohonan pembatalan terhadap defendan ketujuh dan kelapan atas asas bahawa penyata tuntutan itu tidak menzahirkan suatu kausa tindakan yang munasabah terhadap mereka (lihat perenggan 49).

(3) Mahkamah mengenepikan permohonan pembatalan terhadap defendan ketiga, kelima dan kesembilan. Hanya semata-mata fakta bahawa kes plaintif kelihatan lemah tidak sepatutnya dijadikan asas untuk mengenepikan tindakan ini. Dalam kes ini, terdapat fakta yang diplidkan yang mencukupi untuk menunjukkan bahawa kes plaintif terhadap defendan ketiga, kelima dan kesembilan adalah berasas atau tidak sama sekali mempunyai prospek untuk berjaya. Selanjutnya, tidak terdapat keterangan untuk menyokong penyataan bahawa tindakan plaintif ini tidak bona fide, maka permohonan defendan untuk membatalkan tindakan itu di bawah A 18 k 19(1)(d) turut ditolak (lihat perenggan 47–49).

(4) Doktrin *res ipsa loquitur* telah diplidkan di perenggan 42 penyata tuntutan terhadap defendan pertama termasuklah defendan ketiga hingga kelapan. Berdasarkan kepada fakta, kesemua defendan-defendan

yang telah dinamakan dengan jelasnya merupakan defendan-defendan yang berkemungkinan. Defendan pertama, ketiga dan kelima secara kolektifnya mempunyai kawalan yang tunggal dan eksklusif terhadap MH370, maka permohonan pembatalan atas alasan bahawa doktrin *res ipsa loquitur* tidak terpakai kepada situasi ini tidak boleh dipertahankan. Sebagai tambahan, sama ada doktrin *res ipsa loquitur* ini terpakai atau tidak untuk menidakkan liabiliti ke atas defendan adalah merupakan suatu perkara untuk ditentukan selepas keterangan dipertimbangkan selepas perbicaraan (lihat perenggan 39–40).

(5) Kuantum ganti rugi adalah tertakluk kepada pembuktian semasa perbicaraan. Walaupun jika tuntutan plaintif terlampau optimis, ia tidak mewajarkan pembatalan keseluruhan tindakan (lihat perenggan 42).

(6) Mahkamah membenarkan lampiran 16 atas alasan bahawa kehendak ujian pemakaian di dalam kes *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96 telah dipenuhi. Mahkamah berpuas hati bahawa: (a) terdapat dokumen-dokumen yang berada dalam milikan defendan-defendan yang berkait dengan insiden yang dipersoalkan; (b) dokumen-dokumen itu adalah atau mungkin relevan kepada fakta yang telah diplidkan dalam penyata tuntutan; dan (c) ia tidak dipertikaikan secara serius bahawa dokumen-dokumen tetap berada dalam milikan, kawalan dan kuasa defendan-defendan. Selanjutnya, dokumen-dokumen itu yang telah dimohon secara spesifik diperlukan bagi membolehkan plaintif untuk memenuhi kehendak di bawah ss 5 dan 6 Akta (lihat perenggan 56).]

Notes

For cases on application for discovery, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3140–3170.

For cases on application to strike out action, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8809–8847.

Cases referred to

Aleyasak bin Hamid @ Hassan lwn Ketua Polis Kuala Lumpur dan lain-lain [2016] 7 MLJ 226; [2015] 5 CLJ 71; [2015] 4 MLRH 491, HC (refd)

Bank Kerjasama Rakyat Malaysia Bhd v Lee Kam Yoong & Ors (Aseambankers (M) Sdn Bhd & Ors, third parties) [2012] 10 MLJ 73, HC (refd)

Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145; [2009] 6 CLJ 617, FC (refd)

Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440, HC (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734, FC (refd)

Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International) [1990] 2 MLJ 282, HC (refd)

Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors [2014] 6 MLJ 244, CA (refd)
Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd [2013] 3 MLJ 511, CA (refd)
Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] 4 SLR 100
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

Civil Aviation Act 1969 s 2B
Government Proceedings Act 1956 ss 5, 6
Malaysian Airline System Berhad (Administration) Act 2015
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d), (2)

Brijnandan Singh Bhar (Shailender Bhar with him) (Brijnandan Singh Bhar & Co) for the plaintif.
Alice Loke (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Azizul Azmi Adnan JC:

INTRODUCTION

[1] This suit emanates from the disappearance of a Boeing 777 bearing the registration No 9M-MRO and flight code MH370 on 8 March 2014.

[2] The third to ninth defendants applied to strike out the suit in encl 14, which this court allowed in part. There is now a cross-appeal against this decision.

[3] The plaintiffs applied for discovery in encl 16, which I also allowed. The third, fifth and ninth defendants have appealed against this decision.

[4] These grounds record the reasons for the decision of the court in each application. They are dealt with in turn.

STRIKING OUT

The parties

[5] The plaintiffs are the dependents of Puspanathan Subramaniam, a passenger on MH370.

[6] The first defendant was the former operating entity of the national carrier, whose business has since been transferred to the second defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015. However, neither of them were involved in the striking out application in encl 14.

[7] The third defendant, Dato' Sri Azharuddin Abdul Rahman, is the Director General of Civil Aviation, which is a position provided for in the Civil Aviation Act 1969. Dato' Sri Azharuddin heads the fourth defendant, Jabatan Penerbangan Awam (commonly referred to by its English name, the Department of Civil Aviation or 'DCA'), which is the government department charged with the responsibility for civil aviation in Malaysia.

[8] The fifth defendant, Dato' Aloyah bt Mamat, is the director general of Jabatan Imigresen Malaysia, the sixth defendant. Like the fourth defendant, the sixth defendant is a government department.

[9] Tentera Udara DiRaja Malaysia ('TUDM'), the eighth defendant, was headed at the material time by the seventh defendant, General Tan Sri Dato' Sri Rodzali bin Daud.

[10] The striking out application affected only the third to ninth defendants, that is to say, the defendants that were related to the government of Malaysia. The government of Malaysia is the ninth defendant.

[11] In this judgment, unless the context otherwise requires, references to 'the defendants' shall be taken to mean the third to ninth defendants.

The plaintiffs' preliminary objections

[12] The plaintiffs raised three preliminary objections.

[13] Firstly, learned counsel for the plaintiffs contended that the defendants' application for striking out ought to be dismissed on the basis that it was made after pleadings had closed and after the suit had been set down for trial. The case of *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617 was cited, where the Federal Court held:

> It is our view that O 18 r 19(1) of the RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set

down for trial (see the case of *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] CLJ (Rep) 472).

[14] Based on the court's records maintained in its case management system, the trial dates were fixed in a case management conference before Abu Bakar Jais J on 20 May 2016. The defendants' striking out application was filed on 19 May 2016, before the case was set down for trial. This meant that the application ought not be refused purely on this ground.

[15] Secondly, it was argued that the ground for striking out under O 18 r 19(1)(a) of the Rules of Court 2012 had been abandoned by the defendants due to the fact that p 4 of the notice of application did not make any specific reference to O 18 r 19(1)(a).

[16] Page 4 of the application contains the closing paragraphs of the application, which reads as follows:

> Alasan permohonan ini di bawah Aturan 18 Kaedah 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012 akan dinyatakan dengan lebih terperinci dalam Afidavit Sokongan yang diikrarkan oleh Shaiful Nizam bin Shahrin yang difailkan bersama-sama permohonan ini.

[17] In my judgment, it was sufficient for the grounds of application under O 18 r 19(1)(a) to be explained at paras (a), (b) and (d) at p 3 of the notice of application, even though no reference was made to the relevant sub-rule. The words at p 4 of the notice of application merely stated that additional support for the grounds contained in sub-rr (1)(b) and (1)(d) will be deposed in the affidavit in support. This sentence necessarily omitted any reference to sub-r (1)(a) because O 18 r 19(2) prohibits the court from having regard to any evidence for the purposes of making a determination on an application under sub-r (1)(a). Such a determination can only be made on the basis of the pleadings alone.

[18] Thirdly, the counsel for the plaintiffs pointed out that the affidavit in support of the striking out application had been affirmed by a federal counsel acting for the defendants. It is trite law a solicitor should not depose an affidavit on behalf of a litigant if the facts to be deposed are contentious or disputed questions of fact (see *Bank Kerjasama Rakyat Malaysia Bhd v Lee Kam Yoong & Ors (Aseambankers (M) Sdn Bhd & Ors, third parties)* [2012] 10 MLJ 73).

[19] Having reviewed the affidavit in support deposed by federal counsel at encl 15, I was of the view that the affidavit did not contain any disputed or contentious facts. In fact, the affidavit did not contain any facts at all, but raised *points of law*, which in my view ought to have been better addressed by way of

submissions. However, this infirmity in the affidavit in support did not justify my refusing to hear the application, and on this basis I proceeded to hear the application on its merits.

The grounds for striking out

[20] The grounds upon which striking out was sought were as follows:

(a) that the statement of claim did not plead any cause of action against the DCA or its director general;

(b) that the statement of claim did not plead any cause of action against Jabatan Imigresen or its director general;

(c) that the statement of claim did not plead any cause of action against TUDM or Gen Tan Sri Rodzali Daud;

(d) that the doctrine of *res ipsa loquitur* does not apply in relation to the third to eighth defendants, as pleaded by the plaintiffs in the statement of claim;

(e) that the reliefs claimed by the plaintiffs were exaggerated; and

(f) that the entire suit was frivolous and vexatious and an abuse of the court's process.

[21] These grounds are addressed in the following paragraphs, though not necessarily in the order that they have been set out above.

The action against the DCA and Jabatan Imigresen (D4 and D6, respectively)

[22] Both the DCA and Jabatan Imigresen are government departments, and have no separate legal personality. For this reason alone the striking out against the fourth and sixth defendants was allowed. The action would be properly maintained against the ninth defendant, the government of Malaysia.

The action against the Director General of Civil Aviation (D3)

[23] Learned senior federal counsel pointed out that the plaintiffs have not, in the particulars of negligence and breach of statutory duty that have been pleaded in the statement of claim, identified which particulars relate to negligence and which relate to breach of statutory duty. These are two distinct causes of action, and hence, as I understand counsel's argument, the particulars of breach must be related back to one or other cause of action.

[24] In my judgment, the fact that the particulars of breach have not been identified as relating to one or other or to both causes of action does not

warrant a striking out of the action against the third defendant. Whether or not a particular act or omission amounts to a breach of duty — whether that duty be one that exists at common law, or a statutory one — is a question of law, and it is trite that issues of law need not be pleaded. It suffices for the factual particulars of breach to be pleaded, so as to give adequate notice to the defendants of the nature of the plaintiffs' claim to enable the defendants to answer those claims. This had been done, and I saw no reason to allow the striking out on this ground.

[25] Learned senior federal counsel also pointed out that the office of Director General of Civil Aviation is statutorily provided for in the Civil Aviation Act 1969, and that this Act specifically provides for the duties and functions of the Director General. Counsel argued that none of the particulars of breach that have been pleaded related to the duties and functions provided for under s 2B of the Civil Aviation Act 1969, and that s 2B 'does not provide for ensuring the safety of passengers on commercial flights'.

[26] For ease of reference, s 2B provides as follows:

Section 2B Duties and functions of the Director General

It shall be the duty and function of the Director General —

(a) to exercise regulatory functions in respect of civil aviation and airport and aviation services including the establishment of standards and their enforcement;

(b) to represent the Government in respect of civil aviation matters and to do all things necessary for this purpose;

(c) to ensure the safe and orderly growth of civil aviation throughout Malaysia;

(d) to encourage the development of airways, airport and air navigation facilities for civil aviation;

(e) to promote the provision of efficient airport and aviation services by the licensed company; and

(f) to promote the interests of users of airport and aviation services in Malaysia in respect of the prices charged for, and the quality and variety of, services provided by the licensed company.

[27] In the course of submissions, I had asked learned senior federal counsel whose responsibility it is to regulate and manage the safe passage of aircraft over Malaysian airspace (ie air traffic control functions). Counsel conceded that this was a duty of the DCA. Yet this duty was not specifically set out in s 2B. It follows therefore that s 2B is not meant to be an exhaustive listing of the duties and obligations of the Director General of Civil Aviation. Accordingly, the

mere fact that the pleaded particulars of breach cannot be related to a duty or function set out in s 2B does not mean that the action against the Director General of Civil Aviation ought to be struck out.

[28] It was also advanced that the death of Mr Puspanathan, the first plaintiff's husband, was unexpected, unprecedented and unforeseeable, and that absent foreseeability, there cannot be said to exist a duty of care on the part of the third defendant. Learned senior federal counsel cited the recent Federal Court case of *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734, where it was held that:

> (a) the threshold test in determining the existence of duty of care is that of foreseeability. The rule in the case of *Heaven v Pender* as quoted above envisaged that a man ought to have foreseen certain consequences if he created a real risk of them. The test is whether damage to someone in the plaintiff's position was a reasonably foreseeable consequence of the defendant's negligence. Reasonable foreseeability does not of itself lead to a duty of care and that the speech of Lord Atkin of persons who are so closely and directly affected by my act stressed not only on the requirement of foreseeability of harm but also that of a close and direct relationship of proximity;
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> (b) by foreseeability, liability for a consequence is imposed and judged by the standard of the reasonable man that he ought to have foreseen it. In the words of the Privy Council in *Overseas Tankship (UK) Ltd Appellants; and Morts Dock & Engineering Co Ltd Respondents (The Wagon Mound)* [1961] AC 388 at p 423:
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> For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.
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> (c) closer to home, the Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 observed that the requirements of foreseeability is merely a threshold question that needs to be answered in every negligence claim, having regard to the facts of the case without resorting to any legal formulation. By the term factual foreseeability *Spandeck* takes the view that it is from a factual perspective, that the defendant ought to have known that the claimant would suffer damage from his carelessness. Being merely factual, it is not concerned with the kind and extent of losses suffered by the plaintiff and that it must not be confused with the question of remoteness of damages in tort.

[29] In my judgment, death of a passenger in an aircraft would be a foreseeable result of a failure by the DCA to properly and correctly perform its air traffic control functions. Whether or not there was any such failure in this instance is a matter for determination at trial.

The action against the Director General of Jabatan Imigresen (D5)

[30] The plaintiffs claim that there had been breaches of duty by Jabatan Imigresen which had led to the boarding of two passengers, Delavar Seyed Mohammadreza and Pouria Nour Mohammad Mehrda, whose travel documents were purportedly falsified and/or stolen. These breaches, alleged the plaintiffs, compromised the safety of the aircraft and its passengers and crew.

[31] Ms Loke rightly pointed out that the plaintiffs had not pleaded facts to show *how* the fact that the Jabatan Imigresen had allowed Mohammadreza and Mehrda to board the flight had caused the loss of MH370 and the death of Mr Puspanathan.

[32] Nonetheless, as at the time of writing, the cause of the disappearance of MH370 remains unknown. Accordingly, it will not be possible to exclude the possibly that Mohammadredza or Mehrda or both somehow contributed in some way to the disappearance of the aircraft. So long as there remains *some possibility* of their involvement, no matter how remote that possibility may seem based on the state of our understanding of events at the present moment, then the action against the fifth defendant ought not be struck out. The case of *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440 provides the authority for the principle that an action may not be struck out merely because a plaintiff's case is weak, so long as the statement of claim discloses a cause of action:

> The law relating to the summary process of striking out an action on the ground that the statement of claim does not show a cause of action is succinctly stated by Lord Pearson in *Drummond-Jackson v BMA* [1970] 1 WLR 688. I need to reproduce only the more pertinent passages of Lord Pearson's judgment at p 695:
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> > Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim on disclosing no reasonable cause of action is a summary power which should be exercised *in plain and obvious cases*. (Emphasis added.)
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> and at p 696:
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> > In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the evident intention of the rule for several reasons. First, there is in para (1)(a) of the rule the expression 'reasonable cause of action', to which Lindley MR called attention in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, pp 90–91. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by para (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v Feilden* [1966] 2 QB 643 Danckwerts LJ said at p 648:

A The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.

B Salmon LJ said, at p 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment, seat unless the case is unarguable'.

On the authority of the above case it is clear that so long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be C decided by a judge the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

The action against Gen Tan Sri Rodzali Daud (D8) and TUDM (D7)

D **[33]** In the statement of claim, the plaintiffs claimed that, among others, TUDM did not take adequate steps after their military radar detected the turning back of MH370 from its original north-easterly course.

E **[34]** In my judgment, the air force does not owe any duty of care to private citizens, whether to track and report the location of non-military aircraft, to intercept or to search for such aircraft, or, as suggested by the statement of claim, to be accountable for adequate and satisfactory answers to the family members such as the plaintiffs.

F

[35] The primary duty of TUDM is to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The government may, as a matter of practice and custom, utilise the resources for the military for what may essentially be civilian purposes (such as search and rescue, or relief work in G the event of a natural disaster), but the military does not and *cannot* owe a duty to ordinary private citizens for the discharge of those functions. The existence of such a duty would subvert and compromise the principal aim of a military force.

H **[36]** Of course, this does not mean that the military is immune from suits brought by private citizens. For example, if in the proper performance of its functions an accident is caused by the military resulting in loss or damage to a private citizen, that citizen will be well within his or her rights to claim for I compensation for such loss or damage. That was not, however, the case here.

[37] I therefore allowed the striking out of the plaintiffs' action against Gen Tan Sri Rodzali Daud and TUDM on grounds that the statement of claim did not disclose any reasonable cause of action against either of these defendants.

Res ipsa loquitur

[38] The plaintiffs had pleaded that the doctrine of *res ipsa loquitur* applies against the third to eighth defendants. Learned senior federal counsel contended that the doctrine cannot apply in the present instance because one of the criteria for the application of the doctrine is that the thing that inflicted the damage must have been under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control: see *Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors* [2014] 6 MLJ 244. The flight MH370 was not, according to counsel, under the sole management and control of the third to eighth defendants.

[39] The authorities are in agreement with learned senior federal counsel that the doctrine of *res ipsa loquitur* cannot apply where the defendant does not have exclusive control over the property or object that caused the injury. However, in this particular instance, the doctrine was pleaded at para 42 of the statement of claim against the first defendant as well as the third to eighth defendants. The first defendant was the operator of the airline at the material time. The second defendant was presumably not included because it is a successor entity to the first defendant, acquiring property and liability of the first defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015. The ninth defendant, the government of Malaysia, was also not included in para 42 as its liability arises vicariously. Accordingly, the defendants that have been named in the plaint are all the possible defendants (and indeed, as determined in paras 24–28 *ante* also included parties whom in my judgment cannot be held liable for the losses suffered). The first, third and fifth defendants collectively would have had sole and exclusive control over MH370. Therefore this ground for striking out the suit cannot be sustained.

[40] Of course, whether or not the doctrine of *res ipsa loquitur* would apply to impute liability upon the defendants would be a matter for determination after the evidence has been evaluated after trial. This was the second reason why the application for striking out on this ground ought to be refused. *Res ipsa loquitur* is a rule of evidence and not a principle of law, and the rules of evidence can only be properly applied to the evidence to be adduced at trial. It would therefore be premature to strike out the action on this ground.

Whether the plaintiffs' claims are exaggerated

[41] It was advanced for the defendants that the amount of the plaintiffs' claim was exaggerated and inflated in order to sensationalise the suit against the defendants.

[42] In my judgment, the quantum of damages would be subject to proof at trial. Even if the plaintiffs' claim was overly optimistic, it did not justify the striking out of the whole action.

Whether suit is frivolous, vexatious and an abuse of the court process

[43] The final ground upon which the defendants sought to strike out the claim by the plaintiffs was that the suit lacked bona fides and that the manner in which the suit had been brought put the genuineness of the action in doubt. In addition, it was contended that the suit should only have been brought against the first and second defendants, and that it was unnecessary for the other defendants to have been included.

[44] I am unable to agree with this contention of learned senior federal counsel. The plaintiffs have lost a father, a son and a husband. We should live in hope that we do not find ourselves grieving as the plaintiffs do. Therefore the very suggestion that the suit was not bona fide or was not a genuine action was, in my view, inimical to good conscience.

[45] I would not be succumbing to hyperbole by saying that the tragic loss of MH370 was and still remains one of the world's greatest aviation mysteries. If the defendants do not currently know what had happened to the aircraft, then more so the plaintiffs. Seen in this light, the inclusion of the third, fifth and ninth defendants as parties to the suit could not be said to be frivolous, vexatious or an abuse of the court process.

[46] The Court of Appeal decision in *Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511 sums up the meaning of 'frivolous and vexatious' and 'abuse of the process' within the meaning of sub-rr (1)(b) and (1)(d) in the following terms:

> [7] Sub-paragraph (1)(b) of r 19, deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) of the same rule deals with 'an abuse of the process of the court'. In *Murray v Epsom Local Board* [1897] 1 Ch 35 it was held by the court that, 'scandalous' generally refers to matters which improperly cause derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive language (see also *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807 and *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11). The words 'frivolous or vexatious' generally refer to a groundless action or statement with no prospect of success, often raised to embarrass or annoy the other party to the action. In considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of the matter and it is not to be determined by whether the pleading discloses a cause of action or not (see *Attorney General of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274; and *Re*

Vernazza [1959] 2 All ER 200). It was decided in the above cases that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable'.

[8] Raja Azlan Shah J (as HRH then was) had made the following observation in the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32:

> No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no legitimate amendment can save it from being demurrable: per Chitty J, in *Republic of Peru v Peruvian Guano Co*.

[9] Sub-paragraph (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In *Castro v Murray* (1875) 10 Ex 213, the phrase 'abuse of the process of the court' had been described generally to refer to situation where the court's process is used for unlawful object and not for the actual purpose intended to achieve justice. It involves a process which is contrary to good order established by usage. In dealing with this sub-para (1)(d), the judge is entitled to look at the affidavit evidence, on the same principle applicable to sub-para (1)(b). Striking out is not appropriate when there is conflicting evidence in the affidavits. The judge can only determine and decide the issue in question by consideration of the undisputed facts.

[10] In short, the words 'frivolous or vexatious' under r 19(1)(b) refer to cases which are obviously unsustainable or wrong. The words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of bona fide; they also include proceedings where a party is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result (see *Goh Koon Suan v Heng Gek Kiau & Ors* [1990] 1 SLR 1251; *Afro Asia Shipping Co Ltd v Haridass Ho & Partners* [2003] 2 SLR 491; and *Riduan bin Yusof v Khng Thian Huat & Anor* [2005] 2 SLR 188).

[11] The phrase 'abuse of process' under r 19(1)(d) signifies that the process of the court must be used bona fide and properly and must not be abused. It includes consideration of public policy and interest of justice. The court will prevent any improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. If an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court (see *Gabriel Peter & Partners (Suing as a Firm) v Wee Chong Jin& Ors* [1998] 1 SLR 374 and *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489).

[47] The passages above establish that an action that is frivolous or vexatious is one that is groundless and without any prospect of success. The difference between sub-rr (1)(a) and (1)(b) is that, under sub-r (1)(b) the court is entitled to consider the entire background of the matter and is not limited to the

pleadings. In my judgment, the principle set out in *Hu Sepang v Keong On Eng & Ors* (discussed at para 32 *ante*) would also be applicable here, ie that the mere fact that a plaintiff's case may appear weak should not form the basis for striking out the action. In the present instance, there were sufficient pleaded facts to establish that the plaintiffs' case against the third, fifth and ninth defendants was not groundless or bereft of any prospect of success.

[48] I was also of the view that there is no evidence to support the contention that the plaintiffs' action is not bona fide, and hence the defendants' application to strike out the action under O 18 r 19(1)(d) was also refused.

Summary

[49] For the reasons set out above:

(a) I allowed the striking out against the DCA and Jabatan Imigresen Malaysia, the fourth and sixth defendants respectively, on the basis that they are government departments and do not have any separate legal personality;

(b) I allowed the defendants' application to strike out the action against the Gen Tan Sri Rodzali Daud and TUDM, the seventh and eighth defendants respectively, on the basis that the statement of claim did not disclose a reasonable cause of action against them; and

(c) I dismissed the application to strike out the action against the third, fifth and ninth defendants.

[50] As I had allowed the defendants' application in part, I ordered that there be no order as to costs.

[51] In the following paragraphs, I deal with the plaintiffs' application for discovery.

DISCOVERY

[52] The plaintiffs in this case made an application for both general and specific discovery against the defendants. The application for specific discovery related to documents that were necessary to identify the particular persons whom the plaintiffs regard as the tortfeasors in their action.

[53] The plaintiffs' application for discovery cited the following grounds in support:

(a) that it was necessary and desirable in the interests of justice for the documents to be disclosed as it would allow compliance by the plaintiffs

with the requirements of ss 5 and 6 of the Government Proceedings Act 1956;

(b) that the failure disclose the necessary documents would adversely affect the plaintiffs' case;

(c) that the documents were relevant to the issues raised in the pleadings; and

(d) that the plaintiffs have been very specific and precise in their request for documents that are under the possession, custody and power of the defendants, to which documents the plaintiffs do not have access.

The law relating to discovery

[54] In order to succeed in their application for discovery, the plaintiffs must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the judgment of the High Court) in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581:

> The essential elements for an order for discovery are threefold; namely, first, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[55] Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)* [1990] 2 MLJ 282:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may — not which must — either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at p 210.

Findings and decision

[56] In this particular instance, I allowed the application both for general and specific discovery for the following reasons:

(a) firstly, I was of the view that the requirements of the applicable test in *Yekambaran*'s case have been fulfilled: I was satisfied that there are

documents that are in the possession of the defendants that relate the incident in question. I was also satisfied that these documents are or may be relevant to the facts that have been pleaded in the statement of claim. Finally, it was not seriously in dispute that these documents remain in the possession, custody or power of the defendants. Where the defendants contend that a document is protected by privilege, then whether or not privilege applies will be a matter for determination by the court; and

(b) the documents that have been specifically requested are required in order for the plaintiff to fulfil the requirements of ss 5 and 6 of the Government Proceedings Act 1956 and the decision of the Federal Court in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663.

[57] I was of the view that the decision in *Lay Kee Tee* prohibits a plaintiff from making a claim against the government without naming the specific tortfeasor as a party in the action. Senior federal counsel sought to argue that this view was misplaced, and that although ss 5 and 6 provide that the tortious acts must be established against the specific public officers, they do not require the tortfeasors to be named or to be made a party to the action.

[58] This court had the opportunity to review the caselaw relating to ss 5 and 6 of the Government Proceedings Act 1956 in the case of *Aleyasak bin Hamid @ Hassan lwn Ketua Polis Kuala Lumpur dan lain-lain* [2016] 7 MLJ 226; [2015] 5 CLJ 71; [2015] 4 MLRH 491 (see paras 43–64 of the judgment). It is patently clear to this court that the *ratio* of *Lay Kee Tee* is that the tortfeasors must be made a defendant in action before proceedings may be maintained against the government for vicarious liability. It will be recalled that in *Lay Kee Tee*, the alleged tortfeasors, although identified in the statement of claim, had not been included as parties to the action.

[59] Indeed, in the case of *Aleyasak bin Hamid @ Hassan lwn Ketua Polis Kuala Lumpur dan lain-lain* this court had held that the principle in *Lay Kee Tee* does not apply in the limited instance where a plaintiff was not capable of identifying the public officer in question for reasons outside of the plaintiff's control, but this finding was reversed on appeal (in an unreported decision of the Court of Appeal dated 2 February 2016).

[60] The application for discovery was accordingly allowed, with costs to be in the cause.

Enclosure 14 allowed in part with no order as to costs; encl 16 allowed with costs.

Reported by Dzulqarnain Ab Fatar